IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 9, 2003 Session

DORIS DENNIS v. WHITE WAY CLEANERS, L.P., ET AL.

Appeal from the Chancery Court for Davidson County
No. 00-2483-III Ellen Hobbs Lyle, Chancellor

No. M2002-00502-COA-R3-CV - Filed April 7, 2003

OPINION DENYING PETITION FOR REHEARING

BEN H. CANTRELL, P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

White Way Cleaners has submitted a respectful and thoughtful Petition to Rehear. The Company contends that this court's opinion conflicts with and misapprehends existing principles of employment law. Specifically, the Petitioner argues that as a matter of law, the job Ms. Dennis performed was eliminated as part of a reduction in force, and therefore that she could not be deemed to have been replaced by Mr. Elam.

Petitioner refers us to the case of *Godfredson v. Hess & Clark, Inc.*, 173 F.3d 365 (6th Circ. 1999) and other cases for the proposition that Mr. Elam's assumption of one additional duty that Ms. Dennis did not perform conclusively negates the fourth element required for a prima facie case of employment discrimination: that a terminated employee was replaced by someone outside the protected classification.

The Petitioner relies upon the following language from the *Godfredson* case:

> "a work force reduction situation occurs when business considerations cause an employer to eliminate one or more positions within the company. An employee is not eliminated as part of a work force reduction when he or she is replaced after his or her discharge. However, *a person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when work is redistributed among existing employees already performing related work.* A person is replaced only when another employee is reassigned to perform the plaintiff's duties."

173 F.3d at 372 (quoting *Barnes v. GenCorp, Inc.*, 896 F.2d 1457 (6th Circ. 1990), but adding emphasis that was not present in the *Barnes* opinion).

It appears to us that *Godfredson* case presents a very different situation than the one before us. Fifty-nine year old Godfredson had been the Director of Marketing for Hess & Clark's money-losing pet food division when the employer decided to eliminate the largest component of that division. Godfredson had devoted between 60 to 80 percent of his time to the discontinued division. Godfredson was terminated from his position, and his remaining duties were assumed by two younger employees, who continued to perform their other duties, and maintained their job titles and responsibilities.

In contrast, none of Ms. Dennis' duties were eliminated, and all were assumed by Mr. Elam. Although the job title was changed, the only difference between her responsibilities and his was that Mr. Elam also took over Mr. Carrigan's duty of collecting and transmitting payroll information for processing by Paychex. Ms. Dennis testified at deposition that she would also have been capable of assuming that duty if asked. As the federal court noted in *Barnes v. GenCorp, Inc.*, supra, an employer cannot avoid liability by changing the job title or by making minor changes to a job indicative of an attempt to avoid liability. *See* 896 F.2d at 1465, footnote 10.

White Way also argues that even if Ms. Dennis had established a prima facie case of discrimination, she did not produce relevant evidence to rebut Mr. Hummel's testimony that he decided to terminate her for legitimate business reasons. The Petitioner particularly objects to our mention of the retention of Rex Carrigan at an unreduced salary, arguing that its treatment of Mr. Carrigan is totally irrelevant, because he was not "a similarly situated employee."

We believe that the Petitioner is looking at the question too narrowly. Even though Mr. Carrigan performed a different function from Ms. Dennis, he was similarly situated in that he held one of the few high-level management positions in this relatively small firm. We also note that the record indicates that Rhonda Stewart, who was the third most highly paid salaried employee of the company, was terminated at about the same time that Ms. Dennis was, and that other female managers were allegedly demoted within the same time period.

Petitioner argues that these individuals were also not "similarly situated" to Ms. Dennis. Carried to its logical conclusion, their argument would ultimately mean that Ms. Dennis' job was so unique that the company's actions towards any of its other employees cannot be used to establish an inference of discrimination that can survive summary judgment. We do not agree.

As we stated in our opinion, we do not know whether Ms. Dennis is entitled to prevail on her claim. We have merely determined that she has raised genuine issues of material fact which make summary judgment inappropriate.

The Petition is denied.

_____

BEN H. CANTRELL, PRESIDING JUDGE, M.S.